

FILED BY CLERK

AUG 30 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2012-0007
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
RUSSELL LYMAN DECKER,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR201101677

Honorable Boyd T. Johnson, Judge

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Joseph L. Parkhurst

Tucson
Attorneys for Appellee

Harriette P. Levitt

Tucson
Attorney for Appellant

ESPINOSA, Judge.

¶1 Russell Decker was convicted following a jury trial of possession of marijuana for sale with a weight of more than four pounds and transportation of marijuana

for sale with a weight of more than two pounds. He was sentenced to the minimum sentence of four years' imprisonment for each offense, to be served concurrently, and was ordered to pay a fine and fees totaling \$276,020. Decker challenges his conviction and sentence on the ground the court improperly limited his right to cross-examination. For the following reasons, we affirm in part and vacate in part.

Factual Background and Procedural History

¶2 The essential facts are undisputed, and we view them in a light most favorable to upholding the verdicts. *State v. Abdi*, 226 Ariz. 361, ¶ 2, 248 P.3d 209, 211 (2011). In July 2011, a Department of Public Safety highway patrol officer stopped a vehicle in which Decker was riding as a passenger on I-10 south of Picacho. The officer conducted a K-9 search, which yielded 128 bricks of marijuana weighing 142 pounds hidden in the trunk and in and under the front and rear seats of the vehicle. Both Decker and the vehicle's driver, Bryce Fischer, were arrested. Fischer ultimately pled guilty and testified at trial that Decker had assisted him in transporting the load of marijuana from Douglas to Phoenix.

¶3 Prior to trial and in response to the state's motion in limine, the court limited testimony about specific terms of Fischer's plea agreement. Because the agreement contained an error in the sentencing range, the court declined to permit its introduction into evidence or specific testimony as to the punishment Fischer faced under the agreement, but permitted Decker to elicit testimony that Fischer faced significantly less prison time under

the agreement than he would have otherwise.¹ The court later denied Decker's motion for reconsideration, but did allow him to question Fischer regarding his sentence under the agreement, except the range he would have faced without it, and confirmed the document would not be admitted into evidence.

¶4 When cross-examined regarding the 1.5 years' incarceration he faced pursuant to his plea agreement, Fischer volunteered, "[I]t's cut in half from the first plea." Following the state's objection, a bench conference, and a warning from Decker's attorney not to tell him about things not asked, Fischer agreed with defense counsel that his plea agreement "represent[ed] a significant reduction in [his] potential exposure in prison." Before deliberation, the jurors were instructed they could not consider punishment in determining Decker's guilt or innocence. *See State v. Allie*, 147 Ariz. 320, 326, 710 P.2d 430, 436 (1985). We have jurisdiction of this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶5 Decker argues the trial court violated his constitutional right to confront the witnesses against him by limiting his cross-examination of Fischer regarding the amount of prison time he would have faced absent his plea agreement.² *See* U.S. Const. amends. V,

¹The trial court also prohibited Decker from testifying about the possible punishment he faced, explaining that a violation of the order would result in a mistrial and possibly also a finding of contempt. Decker, however, did not testify.

²Decker did not seek to admit testimony of the punishment he would face if convicted, acknowledging on appeal that that testimony would not serve to impeach Fischer's credibility.

VI; Ariz. Const. art. II, § 24. Because he failed to object on constitutional grounds in his argument to the trial court, we review for fundamental error.³ See *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). In these circumstances, Decker has forfeited relief absent fundamental, prejudicial error. *Id.* ¶¶ 19-20. Fundamental error is that which “goes to the foundation of [Decker’s] case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial.” *Id.* ¶ 24.

¶6 “The constitutional rights to due process and confrontation guarantee a criminal defendant ‘a meaningful opportunity to present a complete defense.’” *Abdi*, 226 Ariz. 361, ¶ 27, 248 P.3d at 215, *quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986). “[T]he right to cross-examine a witness is vital to the right of confrontation,” *State v. Doody*, 187 Ariz. 363, 374, 930 P.2d 440, 451 (App. 1996), and deprivation of that right constitutes a denial of due process of law, *Bruton v. United States*, 391 U.S. 123, 131 n.5 (1968). Notwithstanding its import, however, “[t]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant,” *State v. Cañez*, 202 Ariz. 133, ¶ 62, 42 P.3d 564, 584 (2002), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). We review a trial court’s

³Decker does not allege fundamental error, and we generally do not review for such absent a specific request on appeal. See *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). In our discretion, we decline to find he has waived the argument on appeal, and nevertheless review his claim. See *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (we will not ignore fundamental error if found).

order restricting the scope of cross-examination for an abuse of discretion to determine whether the court “unduly inhibited the defendant’s ability to present information bearing on . . . the credibility of witnesses,” and will not disturb its ruling absent a clear showing of prejudice. *Doody*, 187 Ariz. at 374, 930 P.2d at 451.

¶7 Decker contends Fischer’s substantially reduced sentence directly implicated his credibility and the court’s limitation on cross-examination regarding Fischer’s potential exposure without the plea agreement left the jury with a “serious misimpression of the facts.” Absent the plea agreement, Decker calculates Fischer, who had at least one prior felony conviction, would have faced a presumptive prison term of 9.25 years, or a maximum term of 18.5 years, to be served as “flat-time,” in addition to facing incarceration for violating probation. *See* A.R.S. §§ 13-703(I), 13-708(C), 13-3405(A)(4), (B)(11).⁴ Decker asserts that merely informing the jury that Fischer faced “significantly less time” failed to convey the magnitude of Fischer’s potential bias. Decker does not contend the error here was fundamental, but argues he suffered prejudice because, “[w]ithout Fischer’s testimony, it is questionable whether the state could have secured a guilty verdict.”

¶8 The state acknowledges that Decker would have been denied the right to cross-examination had he been deprived of the opportunity to present information bearing on the credibility of a witness, *see State v. McElyea*, 130 Ariz. 185, 187, 635 P.2d 170, 172

⁴Decker further hypothesizes that if Fischer had two prior felony convictions, he would face a maximum of twenty-eight years in prison, flat-time, *see* §§ 13-703(J), 13-708; however, the record on appeal does not indicate whether Fischer had multiple prior felony convictions.

(1981), and does not disagree that the plea agreement sentencing provision bore on Fischer's credibility. The state contends, however, that because the jurors could misuse the evidence, and because the trial court permitted Decker to elicit sufficient testimony to cast Fischer's credibility in doubt, the court reasonably restricted the scope of cross-examination. The state further contends the scope of cross-examination did not deny Decker sufficient information bearing on Fischer's credibility, and argues the court's limitation properly prevented the jurors from inferring Decker's sentencing exposure from the incorrect sentencing ranges contained in Fischer's plea agreement.⁵

¶9 “[E]xposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). The trial court expressly permitted cross-examination on Fischer's motive. Decker's attorney impeached Fischer by exposing the differences between Fischer's trial testimony, which followed his plea agreement, and his initial statement to the police, including that Fischer had not mentioned Decker's involvement to the arresting officer. Fischer testified the plea agreement would “significantly reduc[e]” his sentence to 1.5 years' imprisonment, and Decker's attorney implied by his questioning that Fischer had changed his testimony to implicate Decker in order to obtain favorable

⁵The state also asserts the trial court's ruling “did not preclude cross-examination concerning the ‘significant’ benefit Fischer obtained through the plea agreement,” but only precluded “details of the sentencing range contained in the plea agreement.” This seems to us a distinction without a difference, as the state objected to Fischer's testimony about the 1.5-year term he faced under the agreement, even though he had not mentioned the sentencing range.

treatment. The trial court precluded questioning only as to the specific sentencing range Fischer initially faced due to the errors contained in the agreement and the risk the jury would infer Decker was facing the same punishment. Despite this restriction, Decker was permitted to elicit facts necessary to support his theory that Fischer's testimony was not credible because the state had offered him a substantial benefit to testify, *see Cañez*, 202 Ariz. 133, ¶ 64, 42 P.3d at 585, and the jurors could rely on those facts to "appropriately draw inferences relating to the reliability of [Fischer's testimony]," *Davis*, 415 U.S. at 318. We agree the limits upon cross-examination were reasonable and did not prevent Decker from presenting a defense or impeaching the witness. *See id.*; *see also State v. Towery*, 186 Ariz. 168, 177-78, 920 P.2d 290, 299-300 (1996) (upholding preclusion of plea agreement and limitation on testimony of witness's potential punishment without plea agreement where bias established by other evidence). We conclude there was no Confrontation Clause violation. Accordingly, Decker is not entitled to relief as he has not established that any error, let alone fundamental error, occurred. *State v. Davis*, 226 Ariz. 97, ¶ 20, 244 P.3d 101, 102 (App. 2010).

¶10 Decker also asserts the trial court improperly limited his cross-examination of Fischer by withholding his written plea agreement from the jury. He argues the agreement should have been published to the jury, with the erroneous portions redacted, in order for him to effectively cross-examine Fischer's testimony that "he expected to receive 1.5 years in custody, which was cut in half from the first plea offer." But Decker provides no authority in support of this argument and we therefore do not consider it further. *See*

Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant’s brief shall contain argument with citation to authorities relied on); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (argument waived when insufficient for appellate review).

¶11 Decker further contends the trial court’s concern that the jury would improperly conclude he faced the same punishment reflected in Fischer’s plea agreement should have been alleviated by the court’s instruction not to consider possible punishment when determining guilt or innocence. *See State v. Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d 91, 103 (2007) (jury presumed to follow court’s instructions). However, Decker has shown no Confrontation Clause violation, and he failed to make this argument to the trial court; therefore we decline to address it.

¶12 The state points out in its answering brief that Decker’s conviction violates double jeopardy principles because possession of marijuana for sale is a lesser-included offense of transportation of marijuana for sale. *See State v. Cheramie*, 218 Ariz. 447, ¶¶ 10-12, 189 P.3d 374, 376 (2008); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 21, 965 P.2d 94, 99 (App. 1998). We agree. A double jeopardy violation constitutes fundamental error mandating reversal. *State v. Musgrove*, 223 Ariz. 164, ¶¶ 10, 14, 221 P.3d 43, 46, 47 (App. 2009). And, even if we do not search the record for fundamental error, “we will not ignore it when we find it.” *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007).

Disposition

¶13 Because we conclude the trial court committed no error, we affirm Decker's conviction and sentence for transportation of marijuana for sale. However, because Decker's conviction for possession of marijuana for sale violates double jeopardy principles, that conviction and related sentence are vacated.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge